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No. 210

# In the Supreme Court of the United States

OCTOBER TERM, 1954

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THE UNITED STATES OF AMERICA, AS OWNER OF THE S. S. "CHRISTOPHER GALE," PETITIONER

*v.*

CHRIS NIELSON, ET AL., CO-PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF DAUNTLESS TOWING LINE, AS OWNER OF THE TUG "DAUNTLESS #6"

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## BRIEF FOR THE UNITED STATES

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---

## BRIEF FOR THE UNITED STATES

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### OPINIONS BELOW

The opinion of the district court (R. 106–108) is reported at 112 F. Supp. 730. The *per curiam* opinion of the court of appeals (R. 115), affirming on the opinion of the district court, is reported at 209 F. 2d 958.

### JURISDICTION

The judgment of the court of appeals was entered on February 15, 1954 (R. 116). The petition for a writ of certiorari was filed on July 13, 1954, the time for filing having been extended to July 14, 1954, by order of Mr. Justice Reed en-

tered May 15, 1954 (R. 116). The petition was granted on October 14, 1954 (R. 117). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

## QUESTIONS PRESENTED

A towage contract between a tugboat company (respondent) and a shipowner (petitioner) provided in substance that a pilot in the general employ of the tugboat company, upon boarding the ship (or tow) for purposes of directing the towage operation, should be deemed the servant of the tow, and that the tug would not be liable for damages resulting from his handling of the tow or from his orders to the tugs. Owing to the negligence of the tug employee, acting as docking pilot and directing tow and tugs, the tow damaged one of respondent's tugs while the tow was being maneuvered into its berth. Relying on the contract, respondent filed a libel against the United States, as shipowner, predicated on the negligence of the docking pilot. The following questions are presented:

1. Whether the above provision is consistent with public policy insofar as it provides for exculpation of the tug.

2. If valid for that purpose, whether it would be consistent with public policy to apply it to the situation where the tug seeks recovery against the tow for acts of negligence committed by the general employee of the tugboat company in the performance of the towage operation.

3. Assuming affirmative answers to the above questions, whether the language of the clause in the instant case may be construed to apply to the situation described in Question 2.

**STATEMENT**

On April 5, 1946, the Luckenbach Steamship Company, operator of the United States-owned S. S. CHRISTOPHER GALE under a general agency agreement (R. 11), engaged the Dauntless Towing Line to shift that vessel from Hoboken, New Jersey, to a berth on Fifty-Second Street pier in Brooklyn, New York (R. 47). The arrangements were made by telephone pursuant to a working contract which Luckenbach had with Dauntless. Luckenbach was aware of the conditions, including the so-called "pilotage clause" (R. 48), which provided as follows:

> When the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of her own propelling power goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tug, their owners, agents, or

> charterers shall be liable for any damage resulting therefrom.

Dauntless determined how many tugs would be used and which tugs would be sent (R. 40, 47–48); it also assigned the docking pilot (R. 38, 51).

On the morning of April 6, 1946, the CHRISTOPHER GALE, assisted by two tugs, the DAUNTLESS #6 and DAUNTLESS #9, arrived without incident at the entrance to its slip in Brooklyn. The docking pilot (who was in the general employ of the Dauntless company) was on the bridge directing the operation (R. 107). At this point, the tugs had been made fast to the GALE by lines, the #6 on the port bow and the #9 on the port quarter (R. 52). Because of an increasing wind and flood tide from starboard, the pilot decided to move his vessel part way into the slip, and rest its port side against the corner of the north pier, with the #6 inside the slip and the #9 outside, and then to breast the GALE across the slip to its berth (R. 53). However, the #6 was unable to hold up the bow of the GALE, entering the slip, and the vessel began to sag down toward the north pier. The starboard anchor of the GALE was dropped, but failed to take hold. The #6 was ordered to come ahead full, but was still unable to hold the ship. At this point, the captain of the #6 signalled his deckhand to slack off the lines, and attempted to extricate his tug by moving forward. The tug was unable to complete the maneuver, however, before it was caught be-

tween the GALE and the corner of the pier, and crushed (R. 31–32, 54).

The Dauntless Towing Line brought a libel against the United States under the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. 741, to recover for the damage to the DAUNTLESS #6 (R. 2–5).[1] The issue was tried on the question of liability alone, and the trial court found that the accident was caused solely through the negligence of the docking pilot of the GALE (who directed the movements of both ship and tugs) "in persisting in his attempt to enter the slip after he knew or should have known that he could not overcome the force of the wind and tide and keep the CHRISTOPHER GALE from sagging down on Pier 1" (R. 109).

Dauntless contended that, by reason of the pilotage clause, this pilot, although in its general employ (R. 109), had become a servant of the GALE, and that the GALE was therefore liable for the damage to the tug resulting from his negligence. The Government contended that the clause purported to do no more than relieve the tug of liability for damages and should not be read as intending to make the tow responsible for injury suffered by the tug. The Government also urged that, if it were so interpreted, it would clearly offend public policy.

[1] A libel against Luckenbach Steamship Company was dismissed on authority of *Cosmopolitan Shipping Company* v. *McAllister*, 337 U. S. 783 (R. 108).

The district court found for the libellant (R. 107–109), and the court of appeals affirmed on the basis of the lower court's opinion (R. 115).

## SUMMARY OF ARGUMENT

### I

A. Exculpatory clauses, seeking to shift from tug to tow the tug owner's responsibility for the negligence of his employees, have been incorporated in towage contracts for many years. Their status in the courts, however, has long been unclear. On two occasions, in cases involving a "release clause" (*i. e.*, a clause declaring that all risks of the operation should be upon the tow), this Court declared in general terms that the towing vessel must be visited with the consequences of its own negligence. *The Syracuse,* 12 Wall. 167; *Compania de Navigacion Interior* v. *Fireman's Fund Insurance Company* (commonly known as *The Wash Gray*), 277 U. S. 66. In a third case, however, the Court permitted enforcement of a "pilotage clause" (a clause seeking to render the tugboat captain, while aboard the tow, in legal effect the "lent servant" of the tow). *Sun Oil Co.* v. *Dalzell Towing Company,* 287 U. S. 291. While the lower federal courts have, for the most part, assumed that *Sun Oil* broadly licensed the use of exculpatory provisions, the facts are consistent with a much more limited interpretation. In that case, the tugboat captain was actually performing the work

of the ship (piloting her, under her own power, in the open channel) when the mishap (running the vessel aground through an error of navigation) took place. Whether the Court would have reached the same result if an accident had occurred as a result of the tug captain's negligence in directing the performance of towage from the bridge of the tow is uncertain.

B. Congress has not considered the question whether exculpatory provisions in towage contracts should be permitted. Moreover, the policies reflected in Congressional enactments relating to other aspects of water transportation furnish little guidance.

The courts have not generally looked with favor upon contracts exonerating a party from liability for his own negligence and such contracts, where permitted (as they have been in many situations), are always strictly construed against the party seeking exculpation. Whether public policy absolutely forbids enforcement of such a contract depends upon analysis of the relevant factors to determine whether there is gross unfairness between the parties or reason to apprehend serious detriment to the public interest.

So far as fairness between the parties is concerned, it is evident that the size and resources of tugboat companies as a class are not such as to indicate that they are in a position to dominate their patrons. Nonetheless, these companies have considerable bargaining power by virtue of the

strategic position which they occupy. Moreover, it appears that they have followed a parallel course of action and that the patron may find it extremely difficult to secure towing service without acceding to an exculpatory provision.

The fact that the master and crew of the tow will ordinarily be aboard when towing service is provided furnishes little reason for permitting tug exculpation. In the actual performance of the towage operation, which the tugboat company is hired to direct and conduct because of its special know-how, equipment, and capabilities, effective direction and control passes completely into the hands of the tug company's employees.

There is, however, some economic justification for the tug's effort to shift risk. The operation is inherently hazardous and slight negligence may easily result in serious loss. And the value of the tow or its cargo is often highly disproportionate to the value of the tug.

The very hazards of the operation, however, make it especially important that there be no relaxation of that vigilance which the threat of liability encourages. Perhaps, a sufficiently strong sanction against carelessness by the tug company (which is, of course, a threat to personal safety as well as to property) is the great vulnerability of tugs in the event of mishap. It is accordingly of crucial significance, from the standpoint of the policy considerations, that re-

spondent seeks a rule which not only would permit exculpation from liability but would also permit the tug company to recover for its own loss.

Balancing the various considerations, we doubt that the factors weighing against exculpation are so strong and compelling as to require a holding that the industry practice is to be proscribed and exculpatory clauses deemed entirely void. We urge, however, that in no event should a tug company be permitted to recover for its own loss consequent upon the negligence of its own employees in the performance of towage. There is every reason to apprehend that such an extreme departure from the salutary principle that responsibility should accompany control would come close to destroying the incentive to care which the public interest demands.

II

In any case, the language of the contract should not be read as permitting recovery by the tug against the tow for its own damage. As the words of the clause indicate, the intention was that the tug would be free of liability, not saved harmless from its own loss or damage. This view is supported alike by the rule that exculpatory clauses are to be strictly construed against the party seeking to avoid risk and the canon that provisions of a contract are to be strictly construed against the draftsman.

## ARGUMENT

### I

THE VALIDITY OF EXCULPATORY CLAUSES IN TOWAGE CONTRACTS IS UNSETTLED AND IS SUBJECT TO CONFLICTING POLICY CONSIDERATIONS. IF PERMITTED TO STAND, THEIR EFFECTS SHOULD BE CIRCUMSCRIBED. TO ALLOW A TUGBOAT COMPANY AN AFFIRMATIVE RECOVERY PREDICATED UPON THE NEGLIGENCE OF ITS OWN EMPLOYEE IN DIRECTING A TOWAGE OPERATION IS OBJECTIONABLE

#### A. LITIGATION OVER EXCULPATORY CLAUSES IN TOWAGE CONTRACTS

Some form of exculpatory clause, purporting to shift to the tow responsibility for the negligence of the employees of the tug or the tug owner,[2] has been a common element of towage contracts in this country, as well as elsewhere. While varying to some degree in their phrasing and conditions, these clauses have generally fallen into two categories. One type is the "release clause," which is direct in its effect and provides that all risks of the operation will be upon the tow. The second type is the "pilotage clause," which has become the more common form since this Court's decision in *Sun Oil Company* v. *Dalzell Towing Company*, 287 U. S. 291. This type of provision is indirect in operation and

[2] To avoid confusion, the word "tug" will be used in this brief—except when referring to other types of towing vessels in specific cases—even though the use of these clauses extends to many vessels acting as towers which are not properly classified as tugs.

seeks to render employees of the tug or tug owner in legal effect "lent servants" of the tow.

The validity of these attempts by tug owners to transfer responsibility for the negligence of their employees to tows has been a source of litigation for over eighty years.[3] In 1870, this Court, in *The Syracuse*, 12 Wall. 167, held that a towing steamer, having been found negligent, was liable for damage to its tow (a canalboat) notwithstanding a contractual provision which stated that the boat was towed "at the risk of her master and owners." The Court declared (12 Wall. at 171):

> * * * if it be true * * * that, by special agreement, the canal-boat was being towed at her own risk, nevertheless, the steamer is liable, if through the negligence of those in charge of her, the canal-boat has suffered loss. Although the policy of the law has not imposed on the towing boat the obligation resting on a common carrier, it does require on the part of the persons engaged in her management, the exercise of reasonable care, caution, and maritime skill, and if these are neglected and disaster occurs, the towing boat must be visited with the consequences.

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[3] The first conclusion of law of the District Court in this case (R. 109) apparently recognized that the only possible basis for imposing liability on the CHRISTOPHER GALE for the docking pilot's negligence was the "pilotage clause." This is clearly in accord with the applicable law. *Sturgis* v. *Boyer*, 24 How. 110; *The West Eldara*, 104 F. 2d 670 (C. A. 2).

This declaration failed, however, to settle the issue. A question soon developed as to the basis of the Court's holding: whether the Court had found that the policy of the law required that the towing vessel be forced to bear the responsibility for its own negligence, or had simply found that the disputed clause did not cover the risk of the towing vessel's negligence. Despite the strong language of the opinion, there were considerations which made the case susceptible of a limited interpretation. In the first place, it appears that counsel for the SYRACUSE regarded the question of the vessel's negligence as the crux of the case and did not argue that she was free from liability even if negligent. See *Winslow* v. *Thompson,* 134 Fed. 548, 551 (C. A. 1), and *The Pacific Maru,* 8 F. 2d 166, 171 (S. D. Ga.). Secondly, the law governing towage at the time the case arose was in an uncertain state, and the clause might have been interpreted as intended only to insure that the towing vessel would not be held subject to the absolute liability of a common carrier.[4]

[4] It was not established that a tug was not subject to such a liability until it was so stated in *The Syracuse* opinion itself, and in *The Margaret*, 94 U. S. 494. It was, moreover, not until three years after *The Syracuse* that it was established under federal law that a common carrier could not stipulate against its own fault. *Railroad Company* v. *Lockwood*, 17 Wall. 357. Thus, *New Jersey Steam Navigation Company* v. *Merchants' Bank*, 6 How. 344, had ruled that a

The Second Circuit adopted this limited interpretation of *The Syracuse* in *The Oceanica,* 170 Fed. 893, certiorari denied, 215 U. S. 599. Pointing out that the provision involved in *The Oceanica* had been written after it became certain that a tug's liability extends only to its own negligence and must have been directed at exoneration from such liability, the court held exculpation permissible, a result which it followed in *Ten Eyck* v. *Director General of Railroads,* 267 Fed. 974.

The Ninth Circuit, on the other hand, twice construed *The Syracuse* as proscribing any attempt by a tug to contract against its own negligence. *Alaska Commercial Company* v. *Williams,* 128 Fed. 362; *Mylroie* v. *British Columbia Mills Tug & Barge Company,* 268 Fed. 449, affirmed on other grounds without this question being reached, 259 U. S. 1.

In 1928, this Court decided *Compania de Navigacion Interior* v. *Fireman's Fund Insurance Company,* 277 U. S. 66, commonly known as *The Wash Gray,* in which the towage contract provided that except for the hawser "all other risk and expense" were "to be borne by" the tow, and that the towing vessel was "not responsible in any way for loss or damage to" the tow. The issue was the liability to the tow of its insurers

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common carrier's "release clause," if not directed specifically at negligence, would be read as relieving the carrier from the "insurer's liability" of a common carrier.

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U. S. at 294): "Respondent's [the tugboat company's] responsibility is not to be extended beyond the service that it undertook to perform. It did not furnish pilotage." Whether the Court would have reached the same result if a mishap had occurred as a result of the tug captain's negligence, while aboard the tow, acting as director of the towage operation—the operation which it is the peculiar function of tug companies to perform—is at least open to question.

B. POLICY CONSIDERATIONS BEARING ON THE PERMISSIBILITY OF EXCULPATORY CLAUSES IN TOWAGE CONTRACTS

1. So far as we are aware, the question whether exculpatory clauses in towage contracts should be upheld or condemned has not been considered by Congress. Moreover, the policies reflected in legislation relating to other aspects of water transportation appear indecisive for present purposes.

It is true that as early as 1851 Congress provided for limitations upon the liability of owners of vessels in certain cases, including collisions. Act of March 3, 1851, 9 Stat. 635. The purpose was "to promote the building of ships, and to encourage persons engaged in the business of navigation," *Moore* v. *American Transportation Co.*, 24 How. 1, 39. The policy has subsisted (see 46 U. S. C. 182 *et seq.*) and, since 1886, limitation-of-liability provisions have encompassed all seagoing vessels and all vessels used on lakes or rivers or in inland navigation (Act of June 19,

1886, Sec. 4, 24 Stat. 80). The general tenor of the legislation has been to limit the shipowner's liability, in case of mishap, to the value of his ship and her pending freight (see 46 U. S. C. 183 (a)).

It is arguable that since Congress has enacted provisions which have the general effect, *inter alia*, of limiting the liability of one ship to another,[5] the courts should not countenance an arrangement which goes further, *e. g.*, one which would enable the negligent vessel to avoid liability completely by shifting it to another vessel. While the argument, we think, has some force, it must be conceded that Congress was not focusing upon the problem of two vessels which are working together, by contractual arrangement, in the performance of a specialized task, one of them (the tug) being engaged in the business of servicing the other (the tow). Congress was not addressing itself specifically to the problems of the towing business but to maritime accidents at large.

Congress, of course, has dealt with other types of contractual relationships under maritime law, notably the relationship between vessel and passenger and between vessel and shipper. It has provided that a shipowner may not, by contract, reduce below the statutory ceiling his liability to

[5] As to the applicability of these limitations when a tug's negligence is founded on the acts of its servant acting as pilot of a tow, see discussion in the court of appeals' opinion in *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 65 (C. A. 2).

a passenger for negligence resulting in the latter's personal injury or loss of life (46 U. S. C. 183c; see also 46 U. S. C. 183 (b)). And it has dealt in great detail with the reciprocal rights and liabilities of water carriers and shippers, cutting down on what would otherwise be the common carrier's absolute liability as insurer. Harter Act, 46 U. S. C. 190 *et seq.*; Carriage of Goods by Sea Act, 46 U. S. C. 1300 *et seq.* See *United States* v. *Atlantic Mutual Insurance Co.*, 343 U. S. 236.

It is difficult, however, to draw any inference from Congressional silence on the subject of towage contracts. If it be presumed that Congress has been fully aware of the extent to which exculpatory provisions have been incorporated in towage contracts, it still does not follow that its inaction signifies approval, for one must also presume that it has been equally aware that the status of these provisions in the courts has long been uncertain.

The regulatory authority over water transportation conferred upon the Interstate Commerce Commission by Part III of the Interstate Commerce Act (Transportation Act of 1940, 54 Stat. 898, 929, Section 301 *et seq.*, 49 U. S. C. 901 *et seq.*) embraces towage.[6] *Cornell Steamboat Co.* v.

[6] So far as purely intraharbor operations are concerned, the exercise of jurisdiction under Part III requires a finding that application of the statutory provisions "is necessary to carry out the national transportation policy" (Section 305 (g), 49 U. S. C. 903 (g)).

*United States*, 321 U. S. 634. And for purposes of that Act towing companies may be common carriers if they hold their services out to the general public. *Id.*, p. 638. But the Act was not "designed * * * to determine the legal status of vessels for all purposes"; its object was "to provide for regulation of the rates and services" of competing media of transportation. *Id.*, p. 637. It is expressly declared (Section 320 (d), 49 U. S. C. 920 (d)) that

> Nothing in this part shall be construed to affect any law of navigation, the admiralty jurisdiction of the courts of the United States, liabilities of vessels and their owners for loss or damage, or laws respecting seamen, or any other maritime law, regulation, or custom not in conflict with the provisions of this part.

2. To say that a towing vessel is not treated by admiralty as a common carrier—a proposition established by *The Syracuse*, 12 Wall. 167, and signifying that such a vessel's liability does not extend beyond its own negligence—is only a starting point. Sound public policy, which in the absence of a controlling legislative declaration must ultimately be determined by this Court in the exercise of its admiralty powers, might nonetheless be deemed to prohibit a towing vessel from stipulating against its own negligence in the conduct of those activities which are within its special competence and which the performance of towage

action. The insistence upon exculpatory clauses appears to be widespread, if not universal.

While no statistics are available to show the precise extent to which these clauses appear in towage contracts, the evidence strongly indicates that it would be very difficult to obtain towage service without agreeing to such a provision. More than fifty of these clauses have been involved in court or arbitration proceedings during the past thirty years. This Court now has before it cases involving similar provisions arising from accidents on the Mississippi River, *Bisso* v. *Inland Waterways Corp.*, No. 50,[9] and off the coast of New England, *Boston Metals Co.* v. *S. S. Winding Gulf*, No. 70.[10] Other cases have arisen on the Great Lakes (*Great Lakes Towing Co.* v. *Bethlehem Transportation Corp.*, 65 F. 2d 543 (C. A. 6)), the southern Atlantic coast (*Calzavaro* v. *Planet Steamship Corp.*, 31 F. 2d 885 (C. A. 4)), and the Pacific (*Mylroie* v. *British Columbia Mills Tug & Barge Co.*, 268 Fed. 449 (C. A. 9), affirmed, 259 U. S. 1). The

[9] A brief *amicus curiae* is being filed in No. 50 by counsel representing eight companies operating harbor or river tugs on the Mississippi River and at New Orleans and Mobile. Each of these companies uses a contract containing exculpatory clauses.

[10] In a connected case, it was found that the pilotage provisions of the contract were in accord with the "Standard Towing Conditions as agreed between the Shipping Federation of Canada and Eastern Canadian Tug-Boat Owners' Association." *Adams* v. *The Peter Moran*, 94 F. Supp. 520, 521 (S. D. N. Y.).

district court stated in this case that the challenged clause was "in common use in and around the New York harbor" (R. 107).[11]

The regulations of the War Shipping Administration relating to contracts of towage further indicate the prevalence of the "pilotage clause," the more so since the Administration was primarily an operator of ships and thus not favored by the clause. In Operations Regulation No. 27, December 29, 1942,[12] and in Supplement No. 1 thereto, February 18, 1944, the Administration gave its General Agents, Agents, and Berth Sub-Agents authority to accept such provisions, and additional supplements indicate that in its "master" contracts with companies in Baltimore and Philadelphia "pilotage clauses" were included. Supplement No. 4, December 16, 1944, Supplement No. 6, May 24, 1945.

There is also reason to believe that the use of some form of exculpatory clause is required by marine underwriters for coverage under standard form towing policies. See, *e. g.*, ***Marine Transit Corp.*** v. ***Northwestern Fire & Marine***

[11] In none of the cases (including the instant case) is there any evidence that the patrons of tugboat companies were offered an option to purchase towage service without acceptance of an exculpatory provision.

[12] This regulation, moreover, indicates apparent unanimity among tug operators in adopting a new clause which provided that if the person ordering towage was not the owner of the vessel, he warranted his authority to bind the owner to the pilotage clause.

who had stipulated that "Any agreement * * * by the insured whereby any right of recovery of the insured against any vessel, person or corporation is released, decreased, transferred or lost, which would, on acceptance of abandonment, or payment of loss by this company, belong to this Company but for such agreement * * * shall render this policy null and void as to the amount of any such loss or damage * * *." Since it was held that the loss of the WASH GRAY was not the result of negligence on the part of the towing vessel, construction of the contract might have been avoided. The Court did not choose this course, but explicitly declared (277 U. S. at 73):

> We do not think that the towing contract has the effect claimed for it by the companies. It did not release the "Freeport" from any loss or damage to the "Wash Gray" due to the negligence of the master or crew of the towing vessel * * *.
>
> The rule laid down by this Court in *The Steamer Syracuse* * * * covers the point.

The opinion quotes the language of *The Syracuse* set out above (p. 11) and concludes (p. 74): "In view of this state of the law, the towing contract here shown was not a fact material to the risk, a concealment of which from the underwriters would injure them or avoid the policy."

Four years later, however, in *Sun Oil Company* v. *Dalzell Towing Company*, 287 U. S. 291,

the Court made clear that its prior rulings did not completely preclude tug owners from shifting to their tows some of the responsibility for the negligence of servants in the general employ of the tug. In that case, the SABINE SUN had run aground in open channel while a tug captain was acting as the vessel's pilot. The vessel was accompanied by tugs as it made its way across the channel but it does not appear that the tugs were playing an active role at the time of the mishap or that the fault was anything but an error of navigation such as might have been made had no tugs been present. The contract contained a so-called "pilotage clause" (before this Court for the first time) which stated:

> When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom.

Holding that the tug owner was exonerated, the Court held (p. 294) that "There is no foundation in this case for the application of the doctrine that common carriers and others under like duty to serve the public according to their ca-

pacity and the terms of their undertaking cannot by any form of agreement secure exemption from liability for loss or damage caused by their own negligence."

Lower court decisions since the *Sun Oil* case seem for the most part to have assumed that this Court gave broad license to tug companies to place upon their tows responsibility for the negligence of the tug's employees. *The Primrose,* 3 F. Supp. 267 (E. D. N. Y.); *The John J. Feeney,* 3 F. Supp. 270 (E. D. N. Y.); *The Melvin and Mary,* 23 F. Supp. 398 (E. D. N. Y.); *The Francis Killian, Jr.,* 26 F. Supp. 323 (E. D. N. Y.); *Dalzell* v. *The New York,* 77 F. Supp. 793 (E. D. N. Y.); *Mathiasen Shipping Company* v. *United States,* 87 F. Supp. 216 (S. D. N. Y.). But see *Great Lakes Towing Co.* v. *American Steamship Co.,* 165 F. 2d 368 (C. A. 6), certiorari denied, 333 U. S. 881; *The Walter G. Hoagland,* 184 F. 2d 530 (C. A. 6); *Great Lakes Towing Co.* v. *Bethlehem Transportation Corp.,* 65 F. 2d 543 (C. A. 6); *Petterson Lighterage & Towing Corp.* v. *The J. Raymond Russell,* 87 F. Supp. 267 (S. D. N. Y.). Indeed, implicit in the decision of the Fifth Circuit in *Bisso* v. *Inland Waterways Corp.,* 211 F. 2d 401 (C. A. 5), No. 50, this Term, is an assumption that *The Syracuse* and *The Wash Gray* are no longer controlling. This assumption has now been made explicit by the Second Circuit in *North River Barge Line* v. *Chile S. S. Company,* 213 F. 2d 882.

It is not necessary, however, to suppose that the Court intended, in *Sun Oil*, to overrule the apparent implication of its earlier statements, *i. e.*, that there is danger in permitting a towing vessel to stipulate against liability for its own acts of negligence. There were distinguishing factors in *Sun Oil*. Superficially, there is the fact that the clause was different from those previously before the Court. It stipulated only against the negligence of a tug's servant aboard the tow and thus left the tug liable for the negligence of those remaining on board the tug. But that, standing alone, would hardly seem a factor of critical importance since the clause (like that in the instant case) explicitly sought to protect against the negligence of that servant "in respect to the giving of orders to any of the tugs engaged in the towage service." That is to say, it sought to exonerate the tug company for the negligence of the very man who would be in charge of the entire flotilla and most directly responsible for the safety of tow, tugs, and all others who might be concerned. The fact that the clause was a "pilotage clause" is certainly significant, however, when one considers, additionally, the other facts of the case—that the mishap which occurred bore no relation to the performance or direction of towage but was simply the result of the tug captain's faulty navigation of the tow while serving as its pilot in the open channel. Thus, the opinion stated (287

necessarily entails. Or, short of that, it might be held to require the imposition of limitations upon the enforceability of such agreements.

Contracts to limit the liability of an enterprise for its own acts of negligence have never been favored, and where permitted, as they have been by many courts in a wide variety of situations, the effects have been closely restricted by application of the rule that such agreements are to be strictly construed against the party seeking exculpation.[7]

When it appears, however, that the agreement is explicit, that the enterprise contracting for exculpation does not fall within a special category, such as common carrier or public utility, and that there is no clear indication of gross unfairness between the parties or of detriment to the public interest, the courts have generally permitted enforcement of the bargain. For an extensive collection of the many cases touching the subject, see Note, *Limiting Liability for Own Negligence*, 175 A. L. R. 8. See, also, Note, *The Significance of Comparative Bargaining Power in the Law of Exculpation*, 37 Col. L. Rev. 248; 6 Williston, *Contracts* (1938 ed.), Sections 1751B, 1825. The dangers which are presumed to be present, as a matter of law, when the party seeking to limit liability is a common carrier or public utility may be apprehended in fact in other circumstances.

[7] As to this rule of strict construction, see discussion in Point II, p. 31, ~~*supra*~~ *infra*.

Inevitably, this involves questions of judgment, and it is suggestive of the difficulty of the problem that the courts of various jurisdictions have reached a wide variety of results in closely comparable situations. One finds, for example, considerable disagreement in the cases as to whether such enterprises as warehouses, parking lots, cotton compresses, and gasoline distributing companies should be permitted to contract with their respective patrons for limitations on liability. See Notes cited *supra.*

We shall examine exculpatory provisions in towage contracts, first, from the standpoint of the parties to such agreements and, second, from the standpoint of the broader public interests involved.

Obviously, tugboat companies as a class do not have size and resources which would lead one to infer that they are in a position to dominate the owners of steamships or barges.[8] Nonetheless, they occupy a strategic position. The shipowner depends on the tug for performance of a vital function, and the strength of the tug's bargaining position is, no doubt, greatly enhanced by the fact that the tugboat companies have apparently followed a parallel course of

[8] The presumed lack of the consensual element was an important factor in the decisions of this Court striking down release clauses inserted by common carriers. *Railroad Co.* v. *Lockwood*, 17 Wall. 357, 379 (rail carriers); *Liverpool & Great Western Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441 (water carriers).

*Insurance Co.*, 67 F. 2d 544 (C. A. 2); *The Massmar*, 1942 A. M. C. 230; *The Jason*, 1942 A. M. C. 1358; *Bee Line Transportation Co.* v. *Connecticut Fire Insurance Co.*, 76 F. 2d 759 (C. A. 2).

Another factor is the matter of control. It may be suggested that the owner of a tow retains a much greater measure of control over his property than the shipper who entrusts a crate to a railroad or a warehouse and that exculpation for damage is for that reason inoffensive (or less offensive) here. It is true that the master, officers, and crew of a steamship will generally be at their stations when towing service is provided and that the master has power to relieve the pilot. But this cannot obscure the fact that actual control of a towage operation necessarily rests in the hands of the employees of the tug company. That company's representative acts as pilot of the tow and as director of the operation because he is presumed to be familiar with the harbor, its docks, its waters, and its tides.[13] And it is he who is obliged to make the split-second decisions involved in maneuvering the vessels at close quarters.[14]

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[13] As indicated in the Statement, *supra*, p. 4, the mishap in the instant case occurred while the ship was actually being docked and while the docking pilot was in full control of all three vessels.

[14] The specialized knowledge of the tug operator's employees is illustrated by the case at bar. The docking pilot knew that the DAUNTLESS #6 developed fewer horsepower than the average tug doing transport work in New York

A third factor is economic justification, and here, it must be admitted, there are certain arguments in favor of exculpation which are not without force. Towage in all forms is an operation fraught with risk. Two or more vessels must move under joint control and the chances of error are multiplied. The ships maneuver at close quarters with each other and often with other vessels. Because of the slow speeds usually kept, steerageway may be lost or the vessels may be unduly affected by wind and tide. For these and other reasons the danger of loss is great, and the occasions for large liability from slight negligence are many. Unless exoneration is permitted, the tugs must bear that liability if the negligence is theirs, as it most often would be. Yet the value of the tow or its cargo is often highly disproportionate to the value of the tug. Even non-crippling damage to a large liner might exhaust the value of the tug at fault.[15]

The hazards of towage raise other considerations—considerations which bear directly upon the public interest as distinguished from the nar-

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harbor (R. 40, 46). The master of the GALE had no knowledge of that tug's capacities (R. 104). While it was held below and is not questioned here that the #6 was adequate for her assignment, the fact remains that a more powerful vessel might have saved herself.

[15] It is not clear, moreover, that in all circumstances the tug's value would represent the limit of its liability. See opinion of the court of appeals in *Sun Oil Co.* v. *Dalzell Towing Co.*, 55 F. 2d 63, 65 (C. A. 2).

rower interests of the contracting parties. The risks of personal injury and loss of life, both to persons aboard the tow and tugs and to others, are substantial. As Mr. Justice Frankfurter recently stated (*United States* v. *Atlantic Mutual Insurance Co.*, 343 U. S. at 244, dissenting opinion), the underlying premise of the established doctrine that courts will not approve a stipulation against negligence by a common carrier is that "such an agreement, if enforced, would tend to relax the vigilance and care in seamanship which the threat of liability encouraged."[16] Plainly, the reason of the rule is no less applicable to tugs, upon whose skill and care the welfare of a passenger ship's entire complement may depend, than it is to other vessels which admiralty has denominated "common carriers."

But there is this to be added. In the performance of joint tug-tow operations, the tug and the tug's personnel are highly vulnerable in the event of mishap. This furnishes a measure of assurance that exculpation from liability of tug to tow would not be an open invitation to carelessness.

In the instant case, however, the tug is not seeking mere exculpation but affirmative recovery.

[16] As to the "general rule of law that common carriers cannot stipulate for immunity from their own or their agents' negligence" (opinion of the Court, 343 U. S. at 239), there was, of course, no difference between the majority and the dissenters.

It would use the pilotage clause not merely as a shield but as a sword. Its position is that the tow must pay the tug for the damage resulting to the tug from the negligence of the tug company's employee serving as docking pilot. If release clauses may be given such effect, they will undercut the sanction against negligence which remains even when the tug is relieved from claims of the tow: the possibility of damage to herself.

3. Balancing the various considerations discussed above, we think it doubtful that the indications of possible unfairness or of detriment to the public are sufficiently clear and compelling to require the Court to override completely the industry practice of including exculpatory provisions in towage contracts and to declare such provisions wholly void as against public policy. We urge, however, that it would be objectionable to permit the tugboat company to impose upon the tow, as is sought here, a duty to pay for the damage suffered by the tug itself. If the tow is made the complete insurer of the operation which the tugboat company effectively directs and controls, the latter's incentive to care will be largely sterilized. In the case of the towing industry, which is hazardous and affected with a public interest, such a result, in our view, would exceed reasonable limits and would offend public policy.

## II

### THE LANGUAGE OF THE CONTRACT SHOULD NOT IN ANY EVENT BE CONSTRUED TO PERMIT RECOVERY BY THE TUG AGAINST THE TOW FOR ITS OWN DAMAGE

The pilotage clause in the instant case does not state merely that the pilot, on boarding the tow, becomes the servant of the tow's owners. It goes on to state the consequences which this declared change of relationship is intended to have: "And neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents, or charterers shall be *liable* for any damage resulting therefrom" (emphasis added). Unless this last phrase is to be interpreted as mere surplusage, it must be assumed to modify the preceding words. It follows that no intention to charge the tow with damage suffered by the tug is established by the contract. The clause does not say that the tug company shall be saved harmless or free from any loss; it provides only that the company shall be free from liability.[17] What was promised by the tow was indemnity for such liability, and the obligation to indemnify can arise only when

[17] It can scarcely be argued that the construction which respondent urges was a common understanding of the trade, for it appears that the issue was first raised in the courts in 1948, *i. e.*, after the date of the contract in the instant case. See *Dalzell* v. *The New York*, 77 F. Supp. 793 (E. D. N. Y.).

the indemnitee is under a legal obligation to make payment for a wrong. *The Toledo,* 122 F. 2d 255 (C. A. 2), certiorari denied, 314 U. S. 689. Respondent, as indemnitee, could not be liable to itself and was therefore not entitled to indemnity.

This view of the clause is likewise supported by canons of construction laid down by this Court. Even when a party may validly shift the risks of his negligence to another, the contract must be strictly construed against him, and unless the provisions clearly and unequivocally announce such a purpose they shall not be given that meaning. *Noonan* v. *Bradley,* 9 Wall. 394, 407.[18] And a clause should be strictly construed against its draftsman, in this case the respondent. *Insurance Company* v. *Slaughter,* 12 Wall. 404. As we have previously pointed out (*supra,* pp. 11–14), *The Syracuse* and *The Wash Gray,* if not interpreted as invalidating all attempts by tugs to divest themselves of responsibility, can only be explained as illustrations of the most rigid application of this canon to towage contracts. See also *The Devonshire and St. Winifred,* [1913] P. 13.

Construction of the contract thus fully supports that result which alone appears consistent with sound public policy. See *supra,* p. 29.

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[18] See, also, *Doughnut Machine Corp.* v. *Bibbey,* 65 F. 2d 634 (C. A. 1); *Fairfax Gas & Supply Co.* v. *Hadary,* 151 F. 2d 939 (C. A. 4); *Halliburton Oil Well Cementing Co.* v. *Paulk,* 189 F. 2d 79 (C. A. 5).

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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